

REMARKS

Claims 26-30, 32-36 and 38-46, as amended, are pending for the Examiner's review and consideration. Claims 26 and 38 were amended to recite various preferred embodiments of sugar. Support for this amendment is found in the Specification, paragraph [0017]. The transitional phrase "consists essentially of" has also been added to claims 26 and 38 to exclude types of sugars that affect the basic and material characteristics of the present invention. Claim 35 was amended to recite a preferred amount of salt, from "at least 0.01%" to "about 0.1% to 0.4%." Support for this feature is found in the Specification, paragraph [0016]. No new matter has been added by way of these amendments, such that their entry at this time is warranted.

Claim 26 was rejected under 35 U.S.C. § 112, first paragraph, for lack of possession of the invention on page 2 of the Office Action. The Office Action alleges that claim 26 recites a water activity range of 0.75 to 0.91, but the specification discloses two separate water activity ranges disclosed as two different embodiments (Office Action, page 2).

Applicants agree that the specification discloses two different embodiments. One embodiment of the invention exhibits a water activity range of about 0.80 to 0.91 (Specification, paragraphs [0009] and [0027]). Another embodiment of the invention exhibits a water activity range of about 0.75 to 0.88 (Specification, paragraph [0013]). Claim 26 recites a range of 0.75 to 0.91, which is clearly supported by the two embodiments disclosed. The lower limit of the range (0.75) is provided by the embodiment having a 0.75 to 0.88 range. The upper limit of the range (0.91) is provided by the embodiment having a 0.80 to 0.91 range. Because the two ranges overlap in value, *i.e.*, 0.75-0.88 has common values with 0.80-0.91, the numbers within the claimed range are also supported. *In re Wertheim*, 541 F.2d 257, 264 (CCPA 1976).. For these reasons, this rejection under 35 U.S.C. § 112, first paragraph, has been obviated and should be reconsidered and withdrawn.

Claim 35 was rejected under 35 U.S.C. § 112, first paragraph, for failing to comply with the written description requirement on page 3 of the Office Action. The Office Action alleges that claim 35 recites a salt level of at least 0.01%, which would include an infinite amount of salt, but states that the specification only provides support for no higher than 0.5% (Office Action, page 3). Applicants disagree with this improperly limiting interpretation of the specification with respect to the salt amount. Nonetheless, to expedite prosecution, claim 35 has been amended to recite a more expressly supported amount of salt. Thus, claim 35 now recites an amount of salt from about 0.1% to 0.4%. This range in the

amount of salt is found in the Specification, paragraph [0016]. For these reasons, this rejection under 35 U.S.C. § 112, first paragraph, has been obviated and should be reconsidered and withdrawn.

Claims 26, 28, 30, 32-33, 35 and 46 were rejected under 35 U.S.C. § 103(a) as being obvious over EP0773722 B1 to Hilhorst et al. ("Hilhorst") in view of U.S. Patent No. 5,624,702 to Schotel ("Schotel") and the publication "Nutritive Value of Foods" by Gebhardt et al. ("Gebhardt") on pages 3-5 of the Office Action. Hilhorst is alleged to teach a composition comprising up to 25% of a sugar, 10-40% fermented dairy, 3.3% and 5% maltodextrin, aromatics at less than 2%, and up to 4% salt that is spread on bread (Office Action, pages 3-4). Hilhorst is also alleged to teach dairy cream (40% and 45% fat) in an amount such that the total of fermented dairy and dairy cream is up to 40% of the spread. (*Id.* at page 4). Additionally, the Office Action states that Hilhorst teaches that the spread may contain 0.5 to 15% protein and be derived from dairy sources (*Id.*). The Office Action further contends that Hilhorst teaches that water can be added separately or included with ingredients such as milk (*Id.*), and that Hilhorst teaches that the product may be optionally pasteurized to extend shelf life and teaches refrigerated storage in wrappers (*Id.*). The Office Action admits, however, that Hilhorst is silent in teaching a specific level of dairy cream and using a milk derivative, such as skim milk powder, and is silent in teaching a particular water activity of 0.75-0.91 as presently claimed (*Id.*).

On pages 4-5, the Office Action states that Schotel is relied on as evidence of the conventional "dairy sources" including include skimmed milk powder, yogurt and cream for making water continuous yogurt based spreads for applying onto a bread layer. Gebhardt is relied on by the Office Action as evidence that the conventional levels of protein in skim milk based yogurt is 3.96%, in whole milk yogurt is 3.52%, and in cream is present in traces, along with 40% fat and in skim milk is 35.3% (Office Action, page 5).

Hilhorst does indeed teach a spread of 10-40% fermented dairy, 5% maltodextrin, and up to 4% salt for disposing on bread. Hilhorst does not, however, teach a composition of 8% to 30% of a sugar including sucrose, invert sugar syrup, glucose syrup, honey or combinations thereof, and also fails to teach aromatic products in amounts of 0.01% to 20%, each as presently recited.

Hilhorst is directed to a spread comprising an *oligofructose* fibrous material (Hilhorst, page 2, lines 1-2) Oligosaccharides are known in the art to encompass carbohydrates containing from two up to ten simple saccharides or sugars linked together (The Condensed Chemical Dictionary, 10th ed.). Thus, an oligofructose would be understood

by one of ordinary skill to encompass only those carbohydrates containing two up to ten *fructose* sugars linked together. Indeed, Hilhorst even states that "[t]he oligofructose used will comprise a relatively small amount of molecules having 9 or less fructose units" (Hilhorst, page 3, line 12). These are used to provide a particular structure, or texture, to the spread, but without providing a sweet taste or an undesired off-taste (*Id.* at page 2, lines 43-47). Claim 26, however, recites that the sugar consists essentially of sucrose, invert sugar syrup, glucose syrup, honey or combinations thereof present in an amount of about 8% to 30%. Sucrose is a disaccharide of fructose and glucose, and therefore does not contain two or more fructose sugars. Glucose is a monosaccharide. Therefore, Hilhorst does *not* teach the specific forms of sugars now recited in claim 26, since claim 26 excludes the presence of oligofructose, which would tend to impart an adverse texture and/or taste to the presently recited invention.

The secondary references still fail to remedy the deficiencies of the newly located primary reference, Hilhorst. Schotel, for example, discloses from 0.1 to 15 weight % of added mono or disaccharides (Col. 1, line 50), but Schotel discloses compositions that contain such mono or di-saccharides in combination with *oligofructoses* to obtain a high quality, low fat product (*See* Col. 1, lines 43-46). Schotel describes oligofructoses as preferably being "materials containing one (terminal) sucrose unit, the remaining groups mainly being fructose units" (Col. 1, lines 63-65). Indeed, Schotel's compositions contain both an oligofructose (inulin) and a sugar obtained from non-dairy or dairy cream (*See* Example I, Products A-C). In contrast, the sugars recited in the present invention are *not* "taken from creams." Moreover, Product D of Schotel, which contains only the oligofructose, had an inferior taste and appearance when compared to Examples A-C (Col. 5, lines 22-24). Therefore, one of ordinary skill in the art would have expected that both types of sugars disclosed by Schotel, *i.e.*, an oligofructose and a mono or disaccharide, were required to obtain a suitable material. This effectively *teaches away* from the present invention, which excludes oligofructoses by virtue of the transition language "consists essentially of." As previously noted, oligofructoses are likely to have an adverse impact on the flavor and/or texture of the claimed invention. Indeed, this undesirable trait is demonstrated by Schotel in its examples.

Furthermore, Hilhorst fails to teach the claimed 0.01% to 20% of an aromatic component. Hilhorst does generically teach a flavoring agent in amounts "less than 0.5 wt.%, for example 0.01 to 2 wt.%" (Hilhorst, page 4, lines 16-17). What is claimed, however, is an *aromatic product* (*See* claim 26). Aromatic products include honey, cocoa, coffee, caramel,

hazelnuts, almonds, vanilla, fruit syrup, concentrated fruit juices, or combinations thereof (Specification, paragraph [0021]). Nothing in Hilhorst suggests that its flavoring agents are the same or even similar to the aromatic products of the claimed invention.

Indeed, Examples VI, VII and VIII of Hilhorst support this difference from the claimed invention. Example VI discloses a sweet banana spread with 40% banana puree, and "no flavoring masking additives were needed." Example VII discloses a milk-based spread with 43.78% of milk, while Example VIII discloses a milk-based spread with 31.8% of a coffee extract. As can readily be seen, the flavoring materials of Hilhorst cannot be the banana puree, milk, or coffee extract of Hilhorst's examples, since all of these components are present in amounts much greater than the 2% disclosed in Hilhorst. These components taught by Hilhorst are similar, if at all, to the aromatic products in the claims. Even if they are similar, however, the proportions of the aromatic products claimed is 0.01% to 20%, while that disclosed by Hilhorst is from 31.8% to 43.78%, which is clearly outside the claimed range. This is yet another illustration of the differences of Hilhorst from the claimed invention.

More importantly, none of the cited references disclose or suggest a cream composition that has a water activity of 0.75 to 0.91, as presently recited in independent claim 26. The Examiner makes the unsupported, conclusionary statement that "since Hilhorst teach[es] a water continuous spread with the recited composition one would expect a similar water activity of 0.75-0.91" (Office Action, page 5). As seen by the various disparate prior art references cited by the Examiner throughout the lengthy prosecution of this application, there are a great variety of spreads and dairy materials having a wide range of water activities. There is nothing in the written record to suggest that Hilhorst or Schotel will provide the claimed water activities, particularly in view of the differences of these references from the claimed invention as previously discussed.

In fact, Hilhorst discloses that its spreads will generally include a substantial amount of water, such as from 50 to 84.9 weight percent of the composition, more preferably 55 to 80 weight percent, and most preferred from 60 to 75 weight percent (Hilhorst, page 4, lines 33-34). The water activity of a food, however, is not the same thing as its moisture content. Although moist foods are likely to have greater water activity than are dry foods, this is not always so. In fact, a variety of foods may have exactly the same moisture content and yet have quite different water activities depending on the materials. Thus, one of ordinary skill in the art would not and indeed, *could not*, expect that the moisture content of Hilhorst's spread would necessarily demonstrate the claimed water activity. This

unpredictability in water activity is particularly true, as here, where Hilhorst contains different materials in different amounts from the claimed invention.

Both Schotel and Gebhardt, individually or combined, do not remedy these serious deficiencies of Hilhorst. Schotel, as discussed above, does not teach the above-mentioned features, while Gebhardt is merely a listing of the nutritive values of the edible parts of foods and particularly for protein levels. The claims do not recite protein content and therefore, Gebhardt is completely irrelevant to the claimed invention. Both references fail to disclose or even suggest the features that are lacking in Hilhorst.

Hilhorst, Schotel, and Gebhardt fail to teach the claimed sugars, fail to teach the claimed 0.01 to 20% of an aromatic product, and fail to teach the claimed water activity. Because the cited references, either individually or combined, do not disclose or suggest all of the features of the present invention, independent claim 26, as well as dependent claims 28, 30, 32-33, 35 and 46 cannot be obvious over Hilhorst in view of Schotel and/or Gebhardt. Applicants disagree with the characterizations by the Office Action as to various dependent claims, however, such discussion is moot in view of the patentability of independent claim 26. Thus, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since no *prima facie* case of obviousness has been stated.

Claims 26, 28-30, 32-33, 35 and 46 were rejected under 35 U.S.C. § 103(a) as obvious over Schotel in view of Gebhardt (Office Action, page 6). Schotel is alleged to teach a composition comprising up to 15% of a sugar, 10-40% fermented dairy, 5% maltodextrin, aromatics at less than 10%, and up to 0.4% salt that is spread on bread (*Id.*). The Office Action further states that Schotel teaches dairy cream (40% and 45% fat) in an amount such that the total of fermented dairy and dairy cream is up to 40% of the spread and the total fat content is at less than 7% (*Id.*). Schotel is further alleged to teach a spread that contains 0.5 to 15% protein that may be derived from dairy sources, wherein the dairy sources include skimmed milk powder (*Id.*). The Office Action also states that Schotel shows that water can be added separately or be included with ingredients such as milk, that the product may be optionally pasteurized to extend shelf life and that the product may be refrigerated and stored in wrappers (*Id.* at pages 6-7).

Gebhardt is relied on in the Office Action on page 7 to show that skimmed milk based yogurt has 3.96% protein and traces of fat, whereas whole milk based yogurt has 3.52% protein and 3.08% fat, and cream with 40% fat has traces of protein. The Examiner combines Schotel with Gebhardt to show that one could combine 10% cream (40% fat) with

30% skim milk yogurt to obtain a 4% fat and 1.2% protein level in the spread and include 20% skim milk powder that has 35.3% protein and traces of fat, to provide a protein level of 8.2% protein and 4% fat (Office Action, page 7).

As discussed in the preceding paragraphs, Schotel is directed to a spread comprising an oligofructose and added mono or disaccharides (Col. 1, lines 49-50 and Col. 2, lines 34-35). Because the present invention excludes oligofructoses, and Schotel requires the presence of both types of sugars for its invention to properly function, Schotel *teaches away* from the present invention .

Also, the Examiner admits that Schotel is silent in teaching a particular water activity, but the Examiner makes the erroneous conclusion that since Schotel teaches a moisture-rich composition, one would expect a similar water activity of 0.75-0.91 (Office Action, page 7). Again, it is important to emphasize the fact that the water activity of a food is not the same thing as its moisture content. Therefore, even though Schotel discloses 50 to 84.9 weight %, 60 to 80 weight %, and 65 to 75 weight % of water (*See* Col. 4, lines 38-41), one of ordinary skill in the art would not necessarily expect a water activity of 0.75-0.91 since water activity can vary unpredictably depending on the materials in a given composition. Gebhardt does not remedy any of these deficiencies of Schotel. For the above reasons, Applicants respectfully request that the rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since no *prima facie* case of obviousness has been stated.

Claims 27 and 44 were rejected under 35 U.S.C. § 103(a) as obvious over Schotel in view of Gebhardt as applied to claims 26, 28, 30, 32-33, 35 and 46, evidenced further in view of Tamime et al., U.S. Patent No. 5,573,793 to Saintain ("Saintain") and EP 0666031A2 to Lauro ("Lauro") (Office Action, page 8). Claims 34, 36, and 39-41 were rejected under 35 U.S.C. § 103(a) as obvious over Schotel evidenced by Gebhardt as applied to claims 26, 28, 30, 32-33, 35 and 46 above, further in view of Saintain (Office Action, page 9). Claim 45 was rejected under 35 U.S.C. § 103(a) as obvious over Schotel evidenced by Gebhardt as applied to claims 26, 28, 30, 32-33, 35 and 46 above, further in view of Saintain and U.S. Patent No. 4,721,622 to Kingham et al. ("Kingham") (Office Action, page 10). As explained in the preceding paragraphs, claims 26, 28, 30, 32-33, 35 and 46 are not obvious over Schotel evidenced by Gebhardt. Therefore, the rejection of the above dependent claims, based on the combination of Schotel and Gebhardt, cannot stand.

Moreover, the need for the Office Action to combine as many as five (5) separate references to arrive at an allegedly obvious combination only highlights the nature of

the rejection—an improper hindsight rejection based solely on Applicants claims and specification. For example, dependent claim 45 was rejected using a combination of Kingham and Saintain, which has been previously discussed on the record as being a combination that no one of ordinary skill in the art could reasonably have been expected to make. The Examiner previously agreed, and withdrew the relevant rejections. Thus, Applicants respectfully request that these rejections under 35 U.S.C. § 103(a) be reconsidered and withdrawn, since no *prima facie* case of obviousness has been stated.

Claims 38 and 42 were rejected under 35 U.S.C. § 103(a) as obvious over Schotel evidenced by Gebhardt for substantially the same reasons as claims 26, 28-30, 32-33, 35 and 46 (*See* Office Action, pages 11-12). Applicants respectfully traverse this rejection for the same reasons given with respect to claims 26, 28-30, 32-33, 35 and 46. Independent claim 38 recites similar features as independent claim 26. In relevant part, the water activity in claim 38 is 0.86 to 0.91, and claim 38 recites that the cream composition must be maintained under refrigeration. Nevertheless, a combination of Schotel and Gebhardt still fails to teach or disclose all of the features of the invention recited in claim 38, as previously discussed. For these reasons, Applicants respectfully request that this rejection under 35 U.S.C. § 103(a) be reconsidered and withdrawn since no *prima facie* case of obviousness has been demonstrated on the record.

Dependent claim 43 was rejected under 35 U.S.C. § 103(a) as obvious over Schotel evidenced by Gebhardt, as applied to claims 38 and 42 above, further in view of Saintain. Again, because claims 38 and 42 are patentable over Schotel and Gebhardt, this rejection is moot for at least this reason.

Accordingly, Applicants now believe all claims are in condition for allowance. Should the Examiner not agree with this position, a telephone or personal interview is requested to resolve any remaining issues and expedite allowance of this application.

Respectfully submitted,

1/28/04
Date

Jeffrey A. Wolfson
Jeffrey A. Wolfson (Reg. No. 42,234)

WINSTON & STRAWN LLP
Customer Number: 28765

(202) 371-5770